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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NO. 383

GILSON BROTHERS, a Corporation,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Wisconsin
and
BRIEF IN SUPPORT THEREOF

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HAMMERSMITH-KORTMEYER CO., MILWAUKEE

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Respondent.

PETITION FOR WRIT OF CERTIORARI

TO the Justices of the Supreme Court of the United States:

Gilson Brothers, a Corporation, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the decision of the Supreme Court of Wisconsin, rendered on July 12, 1949, confirming the judgment of the Circuit Court of Ozaukee County, Wisconsin, enforcing an order of the Wisconsin Employment Relations Board, dated September 28, 1948.

The opinion of the Supreme Court of Wisconsin (R. 138-142) is reported in 255 Wis. 316, 38 N.W. (2d) 492. The judgment of the Circuit Court for Ozaukee County, Wisconsin, appears on pages 129-133 of the

printed record. The Findings of Fact, Conclusions of Law, and Order of the Wisconsin Employment Relations Board appear at pages 107-114 of the printed record.

STATEMENT OF THE MATTER INVOLVED

This case involves the question of the power of the Wisconsin Employment Relations Board to regulate activities subject to control by the National Labor Relations Board under the National Labor Relations Act, 49 Stats. 449, as amended.

Gilson Brothers, your Petitioner, hereinafter referred to as the "Company," is a Wisconsin corporation with its plant and principal place of business located in the City of Fredonia, Wisconsin. The Company is engaged in the manufacture and sale of various types of road machinery (R. 108[1]). The Company, in the year 1948, produced and sold products valued in excess of five hundred thousand dollars ($500,000), ninety per cent (90%) of which were shipped to points outside the State of Wisconsin; and during the same period, purchased raw materials, equipment, and other supplies valued in excess of three hundred fifty thousand dollars ($350,000), forty per cent (40%) of which were shipped to Fredonia, Wisconsin, from outside the State of Wisconsin. (R. 120).

On July 21, 1948, the Company discharged Donald Schoedel; and on July 24, 1948, it discharged Arthur

[1] Record references are to the record as printed for the use of the Supreme Court of Wisconsin, to which has been added that Court's opinion and the record certificate of the Clerk of the Supreme Court of Wisconsin, as permitted by Rule 38. References to the complete record are indicated on the left hand side of the record printed for the court below.

Himes and Theophilus Ottenbacher. The United Automobile Workers of America, AFL, Region #9, hereinafter referred to as the "Union," thereafter filed two complaints with the Wisconsin Employment Relations Board, which alleged that the aforementioned employees were discharged "for the sole reason that such employee had been engaging in rights assured to him under the Wisconsin Statutes, and for the purpose of discouraging employees in the exercise of the right to join and become members of the" Union (R. 101-102). The Company filed an answer denying the allegations of the complaints.

The Wisconsin Employment Relations Board, hereinafter referred to as the "State Board," conducted a hearing in Milwaukee, Wisconsin, on August 10, 1948, and issued its Findings of Fact, Conclusions of Law, and Order on September 28, 1948 (R. 107-114).

The State Board found as a fact:

> "That all of such discharges were without cause, were solely for the reason that Schoedel, Himes, and Ottenbacher had engaged in attempting to organize the employees of the Respondent to induce such employees to engage in lawful, concerted activities for their mutual aid and protection, and to become members of the complainant labor organization." (R. 109)

The State Board concluded as a matter of law:

> "That by the discharge of Donald Schoedel, Arthur Himes, and Theophilus Ottenbacher, the Respondent, Gilson Brothers, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 111.06(1)(a) and (1)(c) of the Wisconsin Statutes, by interfering with, restraining, and coercing its employees in their right to join in lawful, concerted activities, and by discourag-

ing, or attempting to discourage membership in the complainant organization by discrimination in the tenure of employment of said Schoedel, Himes, and Ottenbacher." (R. 109-110)

The State Board ordered the Company to:

> "* * * cease and desist from (a) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in lawful, concerted activities (b) Discouraging membership in the complainant labor organization, or in any labor organization, by discrimination in regard to the tenure of employment because any of its employees exercise the right guaranteed them by the Statutes." (R. 110)

The State Board also ordered the Company to reinstate the employees with back pay, and to post a notice in the plant advising the employees of this action, and stating further that:

> "All of our employees are free to join or to assist labor organizations of their choice or to refrain from such activity. All of them are free to become and remain members of any organization, or refrain from any organizational activity. We will not discriminate in regard to the hire or tenure of employment or any terms or conditions of employment against any employee because of membership in or activities on behalf of any labor organization, or because of failure to maintain membership in any labor organization." (R. 113-114)

Upon receipt of the Order of the State Board, the Company petitioned the Board for leave to adduce additional evidence (R. 114-115). At the hearing on the petition, the Company stated that, among other things, it desired to introduce testimony through the Company's president "to show that this Company is engaged in interstate commerce." (R. 115) Upon the Company's offer to introduce

testimony relating to the Company's interstate commerce activities, the Chairman of the State Board who presided at the hearing stated:

> "If the motion was granted, we would certainly not allow that testimony be offered at this time, because there is no excuse for that." (R. 116)

Thereafter, the State Board denied the Company's request for leave to adduce additional evidence (R. 116-117).

On December 30, 1948, the Company was served with a notice of a hearing on a Petition for Enforcement, filed by the State Board in the Circuit Court of Ozaukee County, Wisconsin (R. 117). Thereafter, on January 26, 1949, the Company obtained an order from the Circuit Court of Ozaukee County, Wisconsin, requiring the State Board and the Union to show cause why the Petition for Enforcement should not be dismissed for lack of jurisdiction, and in the alternative, why the Company should not be granted leave to adduce additional evidence relating inter alia to the interstate nature of the Company's business (R. 117-119). Attached to the motion was an affidavit executed by the president of the Company showing that the Company was engaged in interstate commerce (R. 120). The Order to Show Cause and the Petition for Enforcement were argued in the Circuit Court in West Bend, Wisconsin on February 5, 1949 (R. 122).

The Circuit Court denied the Company's Motion to Dismiss and denied its request for leave to adduce additional testimony, and confirmed and enforced the order of the State Board (R. 123-129). The judgment of the Circuit Court was entered against the Company on March 11, 1949 (R. 129-133).

The Company appealed from that judgment; and on July 12, 1949, the Supreme Court of Wisconsin affirmed

the judgment of the Circuit Court of Ozaukee County, Wisconsin, enforcing the order of the State Board (R. 138-142).

JURISDICTION

This case is one over which this Court has jurisdiction under the provisions of the Judicial Code, Title 28, USCA, Section 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In this case, the validity of the Statutes of the State of Wisconsin, to-wit: Sections 111.04, 111.06(1)(a) and (1)(c), 111.07(4) and (7), Wisconsin Statutes 1945, and a direction to enter judgment enforcing an order based on such statutes is drawn into question on the ground that such statutes, order and judgment, as construed in the opinion and judgment of the Supreme Court of Wisconsin, are repugnant to Article I, Section 8, and Article VI of the U. S. Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the National Labor Relations Act, 49 Stats. 449, as amended. The result reached by the Supreme Court of Wisconsin also

constituted a denial of due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States. The Supreme Court of Wisconsin is the last resort of all causes in the State of Wisconsin.

The Petitioner raised the jurisdictional question before the Wisconsin Employment Relations Board (R. 115-116), the Circuit Court of Ozaukee County (R. 123-129) and before the Supreme Court of Wisconsin (R. 138-142). The Supreme Court of Wisconsin held that neither the statutes nor the order based thereon conflicted in any way with the rights conferred or duties imposed by superior federal legislation; namely, the National Labor Relations Act—and held that the Wisconsin Employment Relations Board did have jurisdiction to entertain the proceedings before it and to issue the orders which it made.

Thus, the Supreme Court of Wisconsin has taken the position that the State of Wisconsin may validly regulate activities subject to control by the National Labor Relations Board, and that the exercise of such power does not infringe upon the power of the Congress to regulate interstate commerce as manifested in the National Labor Relations Act.

A copy of the entire record in this case, as certified to be true and correct by the Clerk of the Supreme Court of Wisconsin, is hereby furnished and made a part of this application in compliance with Rule 38, Paragraph 1, of the Rules of this Court.

The State Statutes involved are set forth in Appendix A appearing at pages ~~22-24~~ 21-23.

QUESTIONS PRESENTED

The following important and substantial Constitutional questions are presented here:

(1) Does the Wisconsin Employment Relations Board and the Courts of the State of Wisconsin have jurisdiction over activities subject to regulation by the National Labor Relations Board?

(2) Can the Wisconsin Employment Relations Board acquire jurisdiction over activities subject to regulation by the National Labor Relations Board, by refusing to accept, subsequent to the original hearing, evidence which would oust the State Board from jurisdiction?

REASONS FOR GRANTING THE WRIT

The questions involved are substantial. The decision and judgment of the Supreme Court of Wisconsin are in conflict with the decisions of this Honorable Court in the following cases:

Bethlehem Steel Co. v. N.Y. Labor Relations Board, 330 U.S. 767

LaCrosse Telephone Corp. v. WERB, 336 U.S. 18, 69 S. Ct. 379

International Union, UAW-AFL v. WERB, 336 U.S. 245, 69 S. Ct. 516

Algoma Plywood & Veneer Co. v. WERB, 336 U.S. 301, 69 S. Ct. 584

The decision and judgment of the Supreme Court of Wisconsin create uncertainties as to the rights, duties, and obligations of employers and employees subject to regulation by the National Labor Relations Board. This case presents to this Court the question as to whether the State

of Wisconsin has the power to control activities subject to control by the federal government under the National Labor Relations Act. The labor practices which the State Board seeks to forbid are identical with labor practices which the Congress has empowered the National Labor Relations Board to forbid.

This case involves no reservation of power to the state for the control and regulation of compulsory union membership contracts, as was involved in the *Algoma Plywood & Veneer Company* case, *supra,* or state control over a type of activity not regulated by the federal statutes, as was involved in the *International Union* case, *supra.* This case involves employer-employee activities admittedly subject to control by the National Labor Relations Board.

PRAYER FOR WRIT

Wherefore, your Petitioner prays that a Writ of Certiorari be issued by this Honorable Court and that the judgment of the Supreme Court of Wisconsin may be reviewed.

Respectfully submitted,

CLARK M. ROBERTSON,
Counsel for Petitioner.

O. S. HOEBRECKX
HOWARD R. JOHNSON
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NO.....

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WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Supreme Court of Wisconsin erred in affirming the judgment of the Circuit Court of Ozaukee County, Wisconsin, which judgment affirmed and enforced the order of the Wisconsin Employment Relations Board.

ARGUMENT

Federal Legislation Regulating Interstate Commerce Supersedes the Power of the State to Regulate Identical Activities in Interstate Commerce.

Under Article I, Section 8, of the Constitution of the United States, the Congress is vested with power to regulate commerce with foreign nations and among the several states, and to make all laws necessary and proper for carrying into execution that power. Pursuant to this Constitutional authority, the Congress enacted the National Labor Relations Act, as amended, for the express purpose of eliminating obstructions to interstate com-

merce. Under Article VI, the National Labor Relations Act, as amended, is the supreme law of the land, and the judges in every state are bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Petitioner's Activities Affect Commerce Within the Purview of the National Labor Relations Act as Amended.

Section 2(6) of the Act includes within the meaning of the term "commerce," "trade, traffic, commerce, transportation, or communication among the Several States." Section 2(7) of the Act defines the term "affecting commerce" in the following language:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The State Board found that the Petitioner is a corporation, with its principal place of business in the City of Fredonia, Wisconsin, and is engaged in the manufacture and sale of various types of road machinery (R. 108). The affidavit submitted to the Circuit Court shows that Petitioner, in the year 1948, produced and sold products valued in excess of five hundred thousand dollars ($500,000), ninety per cent (90%) of which were shipped to points outside the State of Wisconsin (R. 120). During the same period, Petitioner purchased raw materials, equipment, and other supplies valued in excess of three hundred fifty thousand dollars ($350,000), forty per cent (40%) of which were shipped to Fredonia from outside the State of Wisconsin (R. 120). These facts conclusively establish that Petitioner was engaged in activities af-

fecting commerce within the purview of the National Labor Relations Act, as that term has been applied and interpreted by this Court. (*NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1; *NLRB v. Fainblatt*, 306 US 601)

The Activities Here Sought to be Regulated by the State Are Subject to Regulation by the National Labor Relations Board.

The complaint filed by the Union alleged violations of Sections 111.06(1)(a), 111.06(1)(c), and 111.04 of the Wisconsin Statutes (R. 101-102).[1] The State Board concluded as a matter of law that the Petitioner had violated these statutes (R. 109-110). The nature of Petitioner's alleged unlawful activities were described by the State Board as:

> "* * * interfering with, restraining, and coercing its employees in their right to join in lawful, concerted activities, and by discouraging or attempting to discourage membership in the complainant organization by discrimination in the tenure of employment of said Schoedel, Himes, and Ottenbacher." (R. 110)

Petitioner was ordered to cease and desist from:

> "(a) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in lawful, concerted activities.
>
> "(b) Discouraging membership in the complainant labor organization, or in any labor organization, by discrimination in regard to the tenure of employment because any of its employees exercise the right guaranteed them by the Statutes." (R. 110)

Petitioner was further ordered to post a notice stating in part:

> "All of our employees are free to join or to assist labor organizations of their choice, or to refrain

[1] These statutes are set out in full on pages 22-24 in the appendix attached hereto. 21-23

from such activity. All of them are free to become and remain members of any organization, or refrain from any organizational activity. We will not discriminate in regard to the hire or tenure of employment or any terms or conditions of employment against any employee because of membership in, or activities on behalf of, any labor organization, or because of failure to maintain membership in any labor organization." (R. 113)

Section 7 of the National Labor Relations Act, as amended, defines "rights of employees" in part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *"

Section 10(a) of the Act empowers the National Labor Relations Board to prevent the following unfair labor practices as listed in Section 8:

> "(a) It shall be an unfair labor practice for an employer—
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7:"
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *"

A comparison of the foregoing provisions with the sections found by the State Board to have been violated shows conclusively that the State Board is attempting to regulate activities subject to regulation under the National Labor Relations Act. Paragraph 1(a) of the State

Board's cease and desist order seeks to prevent activities coming within the purview of Section 8(a)(1) of the National Labor Relations Act; and Paragraph (1)(b) of the same order seeks to prevent activities coming within the purview of Section 8(a)(3) of the National Labor Relations Act. It should be noted that neither the complainant union nor the State Board at any time contended that the National Labor Relations Board did not have jurisdiction over the activities here involved.

The Power of the National Labor Relations Board to Prevent the Unfair Labor Practices in Section 8 is Exclusive.

In Section 10(a) of the Act, Congress not only empowered the National Labor Relations Board to prevent the stated unfair labor practices, but clearly manifested an intention to exclude all interference with the policies and procedures as set forth in the Act. Section 10(a) of the federal act provides in part as follows:

> "This power (the power of the National Board to prevent unfair labor practices) shall not be affected by any other means of adjustment or *prevention* that has been or may be established by agreement, *law* or otherwise:" *(Italics and parenthetical insertion supplied)*

Moreover, Congress expressly altered a previous policy under the Wagner Act and limited the power of the National Board to cede jurisdiction only in certain specific instances. It should be noted that Petitioner here is a manufacturer in interstate commerce, and this is one of the instances where the National Board is not authorized to cede jurisdiction "except where predominantly local in character." (Sec. 10(a)). The record here contains no evidence that the National Board has ceded jurisdiction to the State Board over Petitioner's operations.

The Supreme Court of Wisconsin, in sustaining the power of the State Board to issue the order here involved, stated:

> "There is nothing in the record to indicate that the National Labor Relations Board had ever accepted or attempted to exercise jurisdiction in a matter affecting the company or its employees, or that any petition has ever been filed requesting it to *so* act. Under the law as established by prior decisions of this court, the Wisconsin Employment Relations Board had jurisdiction. (*Wisconsin Labor R. Board v. Fred Rueping L. Co.,* 228 Wis. 473, 279 N.W. 673. *Allen-Bradley Local 1111 v. Wisconsin E. R. Board,* 237 Wis. 164, 295 N.W. 791. *International B. of E. W. v. Wisconsin E. R. Board,* 245 Wis. 532, 15 N.W. (2d) 823. *International Union v. Wisconsin E. R. Board,* 250 Wis. 550, 27 N.W. (2d) 875, 28 N.W. (2d) 254. *Wisconsin E. R. Board v. Algoma P&V Co.,* 252 Wis. 549, 32 N.W. (2d) 417."

All of the cases cited in the preceding quotations were decided prior to the decision of this Court in the *LaCrosse Telephone Corp. v. WERB* case, 336 U.S. 18, 69 S. Ct. 379. The precise issue here raised by Petitioner was involved in that case. The Supreme Court of Wisconsin stated in its opinion in *LaCrosse Telephone Corp. v. WERB,* 251 Wis. 583, at page 592:

> "* * * although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here until the federal power is exercised or jurisdiction thereto is taken as to particular employees."

The Wisconsin Court, in the *LaCrosse Telephone Corp.* case, *supra,* found that this Court's decision in *Bethlehem Steel Co. v. N.Y. Labor Relations Board,* 330 U.S. 767, was distinguishable, because, in the *LaCrosse* case, as here, the procedure of the National Board had

not been invoked. This Court had stated in the *Bethlehem Steel* case, *supra*:

> "Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past." (P. 775)

> "The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general * * * We do not believe this leaves room for the operation of the state authority asserted." (P. 776)

This Court, upon review of the *LaCrosse* case, *supra,* did not agree with the distinction made by the Wisconsin Court as to the application of the *Bethlehem Steel* case. The concurrent jurisdiction theory, relied upon by the Wisconsin Court to sustain the State Board's jurisdiction, was specifically rejected by this Court in the *LaCrosse Telephone* case, *supra,* in the following language:

> "The Wisconsin Supreme Court concluded that the Wisconsin Board could exercise jurisdiction here until and unless the National Board undertook to determine the appropriate bargaining representative or unit of representation of these employees. This view was urged on us in the like cases coming here under a New York statute. In *Bethlehem Steel Co.*

v. State Board, supra, at 776, we rejected that argument saying:

> 'The State argued for a rule that would enable it to act until the Federal Board has acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here.'

"We went on to point out that the National Board had jurisdiction of the industry in which those particular employees were engaged and has asserted control of their labor relations in general. Both the state and federal statutes had laid hold of the same relationship and had provided different standards for its regulation. Since the employers in question were subject to regulation by the National Board, we thought the situation too fraught with potential conflict to permit the intrusion of the state agency, even though the National Board had not acted in the particular cases before us."

"Those considerations control the present cases. This employer is concededly engaged in interstate commerce, and the industry is one over which the National Board has consistently exercised jurisdiction." (69 S. Ct. 379, P. 382)

The *International Union* and *Algoma Plywood* cases, referred to by the Wisconsin Court in its opinion, were also reviewed by this Court. In those cases, this Court sustained the jurisdiction of the State Board, but not on the theory of concurrent jurisdiction. In both cases, (*International Union, UAW-AFL v. WERB,* 336 U.S. 245, *Algoma Plywood & Veneer Co. v. WERB,* 336 U.S. 301) this Court again rejected the theory that the state had the power to act with respect to labor relations matters subject to regulation by the National Board until the National Board had taken jurisdiction. In the *International Union* case, *supra,* this Court reaffirmed the ex-

clusive jurisdiction of the National Board in the following language:

> It seems to us clear that this case falls within the rule announced in *Allen-Bradley* that the state may police these strike activities, as it could police the strike activities there, because *'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the Federal Board.' There is no existing or possible conflict or overlapping between the authority of the federal and state boards,* because the federal board has no authority either to investigate, approve, or forbid the union conduct in question. *This conduct is governable by the state, or it is entirely ungoverned."* (*Italics ours*) (69 S. Ct. 516. P. 521)

In the *Algoma* case, *supra,* this Court stated:

> "The States are free (*apart from preemption by Congress*) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law as an 'unfair labor practice.'" (69 S. Ct. 584, P. 587—*Italics ours*)

The exclusive jurisdiction of the National Board was expressly recognized by this Court in the following language:

> "Since the enumeration by the Wagner Act and the Taft-Hartley Act of unfair labor practices *over which the National Board has exclusive jurisdiction does not prevent the States from enforcing their own policies in matters not governed by the federal law,* such freedom of action by a State cannot be lost because the National Board has once held an election under the Wagner Act. The character of activities left to State regulation is not changed by the fact of certification." (*Italics ours*) (69 S. Ct. 584, P. 591)

The clear import of this Court's decisions, commencing with the *Bethlehem Steel* case, *supra,* is that the National

Labor Relations Board has exclusive jurisdiction to prevent the unfair labor practices listed in Section 8 of the National Act. Control over labor relations which may be exercised by the states is limited to the area not preempted by the federal government.

The State Board Cannot Acquire Jurisdiction by Refusing to Receive Evidence of Petitioner's Interstate Commerce Activities.

At the time of the hearing in August of 1948, the concurrent jurisdiction doctrine was law in the State of Wisconsin. However, at the time the State Board issued its order on September 28, 1948, it was known generally that the validity of this doctrine was at issue in the *LaCrosse Telephone* case, *supra,* then pending before this Court. The Petitioner sought immediately to reopen the record for the purpose of introducing evidence showing the details of Petitioner's interstate commerce activities. This Court's decision in the *LaCrosse* case, *supra,* was handed down on January 19, 1949; and Petitioner, on January 26, 1949, again renewed its request for leave to adduce such evidence before the Circuit Court. The opinions of both the Circuit Court and the Supreme Court of Wisconsin clearly indicate that the introduction of such evidence would not have altered their decisions as to jurisdiction. Both Courts justified the exclusion of this evidence on the ground that the application to adduce the evidence was not timely.

In this determination, it is submitted that the State Board, the Circuit Court for Ozaukee County, and the Supreme Court of Wisconsin erred. The law with respect to the obligation of the State Board to receive the evidence as to jurisdiction is well settled and is carefully stated in 14 Am. Jur., Section 191, which reads as follows:

"Where judicial tribunals have no jurisdiction of the subject matter, on which they assume to act, their proceedings are absolutely void in the strictest sense of the term; and a court which is competent to decide on its own jurisdiction in a given case may determine that question at any time in the proceedings of the cause, whenever that fact is made to appear to its satisfaction, either before or after judgment. Accordingly, an objection for want of jurisdiction, if it exists, may be raised by answer or at any subsequent stage of the proceedings; in fact, it may be raised for the first time on appeal. A court will recognize want of jurisdiction over the subject matter even if no objection is made. Therefore, whenever a want of jurisdiction is suggested, by the court's examination of the case or otherwise, it is the duty of the court to consider it, for if the court is without jurisdiction, it is powerless to act in the case.

"A plaintiff against whom judgment went in the lower court may on appeal raise the question of the jurisdiction of the trial court and have the judgment reversed if the court did not have jurisdiction of the subject matter, although the assumption of jurisdiction was to his advantage.

"As heretofore shown, the jurisdiction of a court over the subject matter of a cause of action must be conferred by law, and it cannot under any circumstances be conferred on a court, as such, by the consent of the parties. It naturally follows that if jurisdiction cannot be conferred by consent, the want thereof cannot be waived by any act of the parties."

The following decisions of this Court are cited in support of the above quotation:

Panhandle Eastern Pipeline Co. v. Federal Power Comm., 324 US 365

Matson Nav. Co. v. US, 284 US 352

City of Gainesville v. Brown-Crummer Inv. Co., 277 US 54

North Pacific SS Co. v. Soley, 257 US 216

The action of the Wisconsin State Board and the Wisconsin courts in depriving Petitioner of the right to adduce the evidence as to jurisdiction constitutes a denial of due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

Wisconsin Statutes, 1945

Sec. 111.04

"Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

Sec. 111.06(1)(a)

"(1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain, or coerce his employees in the exercise of the rights guaranteed in Section 111.04."

Sec. 111.06(1)(c)

"(1) It shall be an unfair labor practice for an employer individually or in concert with others:

(c) 1. To encourage or discourage membership in any labor organization, employee agency, committee, as-

sociation or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; * * *"

Sec. 111.07(4)

"(4) After the final hearing the Board shall promptly make and file its findings of fact upon all of the issues involved in the controversy, and its order, which shall state its determination as to the rights of the parties. Pending the final determination by it of any controversy before it the Board may, after hearing make interlocutory findings and orders which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the Board may deem proper. Any order may further require such person to make reports from time to time showing the extent to which it has complied with the order."

Sec. 111.07(7)

"(7) If any person fails or neglects to obey an order of the Board while the same is in effect the Board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the Board. Upon such filing the Board shall cause notice thereof to be served upon such person by mailing a copy to his last known post office address, and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein. Said action may thereupon be brought on for hearing before said

court upon such record by the Board serving ten days written notice upon the respondent; subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing the court may confirm, modify, or set aside the order of the Board and enter an appropriate decree. No objection that has not been urged before the Board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact made by the Board, if supported by credible and competent evidence in the record, shall be conclusive. The court may, in its discretion, grant leave to adduce additional evidence where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the Board. The Board may modify its findings as to the facts, or make new findings by reason of such additional evidence, and it shall file such modified or new findings with the same effect as its original findings and shall file its recommendations, if any, for the modification or setting aside of its original order. The court's judgment and decree shall be final except that the same shall be subject to review by the Supreme Court in the same manner as provided in Section 102.25."